FILED BY CLERK
APR 19 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RANDY MICHAEL GARCIA, Appellant.	2 CA-CR 2008-0412 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200800297

Honorable James Conlogue, Judge

REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Sharmila Roy
Laveen
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Randy Garcia was convicted of one count each of burglary and theft. The trial court sentenced him to presumptive, consecutive prison

terms totaling three and a half years.[1] Garcia raises numerous issues on appeal. For the following reasons, we remand Garcia's case to the trial court to determine whether a mistrial was warranted under the circumstances of the case.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Garcia entered a storage container belonging to S.H. without permission and took a winch, as well as several oxygen cylinders. The next day, police were at Garcia's father's home on an unrelated matter and saw the winch on the back of Garcia's SUV. Garcia was charged with and subsequently convicted of third-degree burglary of the storage container and theft by control of the winch. This appeal followed.

Motion for Mistrial

¶3 Garcia first argues the trial court erred in denying his motion for mistrial which was premised upon a witness's testimony that Garcia had been committing other burglaries in the area. A mistrial is the "'most dramatic remedy for trial error and should

[1]The sentencing minute entry states that Garcia was sentenced to a presumptive term of 2.5 years for his burglary conviction. During the oral pronouncement of sentence, the court found "the presumptive term of imprisonment" appropriate and sentenced Garcia to "one and one-half years" in prison. The presumptive term of imprisonment for burglary in this case is 2.5 years, as reflected in the sentencing minute entry. Remand for clarification is unnecessary when a discrepancy between the minute entry and oral pronouncement of sentence can be resolved by referring to the record. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). Here, the oral pronouncement of sentence stated that Garcia was sentenced to the presumptive term for the burglary conviction. We therefore find that the minute entry, combined with the oral pronouncement, evidences the trial court's intent to impose a 2.5-year presumptive sentence. *See id.*

be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

> The trial court must consider two factors in determining whether to grant a motion for a mistrial based on a witness's testimony: (1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors.

State v. Lamar, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). And when a witness "unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). An appellate court gives great deference to the trial court's decision because the trial court "is in the best position to determine whether the [testimony] will actually affect the outcome of the trial." *Id.* Therefore, a trial court's denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

¶4 During cross-examination of a sheriff's deputy, Garcia's attorney asked whether the deputy had received any information from an informant implicating Garcia. The prosecutor interjected and cautioned defense counsel that this question could "open[] the door" to improper information about other investigations, so the court instructed him to be "very specific" in his questioning. Defense counsel then asked if the deputy had received "an informant tip that . . . Garcia committed this specific burglary of a winch at

this property in this container." The deputy responded that he had not "receive[d] information of this specific burglary."

¶5 Inexplicably, Garcia's attorney rephrased his question, asking the deputy whether he had "receive[d] a specific informant tip that . . . Garcia committed this particular burglary on this property, on this container, and took this specific piece of property." The deputy replied he had "received information that [Garcia] was committing burglaries in the area, if that's what you're asking." Garcia did not immediately object, but later moved for a mistrial based on this testimony, arguing that the deputy's response was unresponsive, "damning" and "irretrievably prejudicial." The trial court found that the testimony occurred during defense counsel's questioning of the witness and "the answer was responsive." It therefore denied the motion.

¶6 As a preliminary matter, the state contends that, even if the deputy's statement was erroneous, the trial court correctly denied the motion, finding any error in the testimony was invited. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001). In assessing whether an error is invited, we examine the source of the error, "which must be the party urging the error" for the doctrine to apply. *Id.* ¶ 11. Although the defense, not the state, elicited the testimony and the state even warned the defense that the particular line of questioning "might be opening the door" to harmful testimony, the deputy's statement was unresponsive to the question posed by the defense on cross-examination. Garcia was thus not the source of the deputy's testimony and, accordingly, the testimony did not constitute invited error. We therefore address Garcia's contention that the deputy's testimony constituted error sufficient to warrant a mistrial.

¶7 Citing *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979), Garcia argues that the deputy's testimony was erroneous and warranted a mistrial because it involved evidence of inadmissible prior acts he may have committed. In *Smith*, our supreme court held that, generally, evidence indicating "serious[,] unrelated[,] prior bad acts of the defendant that would otherwise be inadmissible . . . merits a mistrial." 123 Ariz. at 250, 599 P.2d at 206. The deputy's testimony called the jury's attention to matters it would not be justified in considering. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. Accordingly, it was inadmissible and satisfied the first requirement for a mistrial. *See id.*

¶8 Nevertheless, a mistrial is not warranted unless the inadmissible evidence also probably influenced the jury. *Id.* Although the prejudicial effect of the deputy's statement was likely limited and the prosecutor did not mention it in closing, because the trial court rejected the mistrial motion based on invited error, the court did not make any findings on whether, under the circumstances of the case, the testimony probably influenced the jurors.[2] *See id.*; *Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d at 359. We therefore remand this matter to the trial court, which is directed to enter factual findings and

[2]We note the trial court did not determine whether a remedy short of a mistrial would cure the error. But Garcia does not contend on appeal that a curative instruction would have been an inappropriate remedy for the deputy's testimony. And prior to his motion for mistrial, which he made following the testimony of both the deputy and a subsequent witness, Garcia never objected to the deputy's statement or requested that the court give the jury a curative instruction. Although the trial court must determine whether a remedy short of a mistrial, such as a curative instruction, could have cured the impact of the deputy's erroneous testimony, *Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d at 359, the court "does not err in failing to [prescribe a curative] instruction if trial counsel does not properly request [one]," *State v. Nordstrom*, 200 Ariz. 229, ¶ 51, 25 P.3d 717, 735 (2001).

conclusions as to whether a mistrial was an appropriate remedy under the circumstances. If it was, the trial court must grant Garcia's motion and vacate the convictions.

Admission of Defendant's Prior Felony Conviction

¶9 Garcia next argues that his prior conviction for possession of a forgery device was more prejudicial than probative and therefore claims the trial court erred by failing to consider the conviction's prejudicial effect when determining whether to sanitize it. The state claims Garcia failed to object to the trial court's refusal to sanitize his conviction during trial and therefore asserts that Garcia has forfeited all but fundamental error review of the claim. Although Garcia did not object to the introduction of his unsanitized prior conviction during trial, he did orally move to sanitize the conviction during a pre-trial hearing. When a motion in limine is made and ruled on, "the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). Accordingly, we review Garcia's claim for an abuse of discretion. *See State v. Montano*, 204 Ariz. 413, ¶ 66, 65 P.3d 61, 74 (2003) (within trial court's discretion to sanitize prior conviction).

¶10 Pursuant to Rule 609(a), Ariz. R. Evid., a prior felony conviction shall be admitted to impeach a witness's credibility if, inter alia, its probative value outweighs its prejudicial effect. If the admission of a prior felony conviction is determined to be potentially prejudicial to a defendant, however, the conviction need not always be excluded entirely. *See State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989). Rather, "potential prejudice to a defendant may be mitigated by prohibiting the

prosecution from revealing the nature of the [defendant's] prior convictions" or, in other words, sanitizing the conviction. *Id.*

¶11 Citing *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995), Garcia claims the trial court erred in refusing to sanitize his prior conviction without determining, on the record, whether the probative value of the conviction outweighed the possible prejudice of its admission. But *Bolton* does not require the court to balance a conviction's probative value and prejudicial effect on the record when determining whether the conviction should be sanitized. 182 Ariz. at 303, 896 P.2d at 843. Rather, *Bolton* simply states that if the court determines that, with the admission of a defendant's prior conviction, "the potential for prejudice is particularly strong," the court may admit the conviction yet attempt to reduce its risk of prejudice by prohibiting the state from disclosing its nature.[3] *Id.*

¶12 Garcia also argues, however, that even if the trial court did not err in refusing to sanitize his conviction, the conviction itself was nevertheless inadmissible because the state failed to file a timely motion, pursuant to Rule 609, to introduce it for impeachment purposes. Pursuant to Rule 16.1, Ariz. R. Crim. P., all motions must be

[3]To the extent Garcia also claims the trial court was required to make an on-the-record finding that the probative value of his conviction outweighed its prejudicial effect in order to admit the conviction at all, the omission of an on-the-record finding is not fatal when it is "'clear from a reading of the record'" that the court made such findings. *State v. Whitney*, 159 Ariz. 476, 484-85, 768 P.2d 638, 646-47 (1989), *quoting State v. Poland*, 144 Ariz. 388, 400, 698 P.2d 183, 195 (1985). Here, the trial court stated that it had considered the probative value of Garcia's conviction. And Garcia specifically asked the court to also consider the conviction's prejudicial effect. It is therefore clear from the record that the court balanced the probative value of Garcia's prior conviction with its prejudicial effect and did not err by failing to explicitly place that finding on the record.

made "no later than 20 days prior to trial" or they will be precluded from consideration. Nevertheless, "'[t]he preclusion sanction . . . exists [only] in order to insure orderly pretrial procedure in the interests of expeditious judicial administration . . . [and] its invocation, therefore, rests in the discretion of the trial court. . . .'" *State v. Zimmerman*, 166 Ariz. 325, 328, 802 P.2d 1024, 1027 (App. 1990), *quoting State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985). The court may, therefore, extend the time to file motions past the twenty-day deadline imposed by Rule 16.1(b) and also "has the discretion to hear late motions." *Id.*

¶13 Here, the state did not file a written motion to introduce Garcia's prior convictions for purposes of impeachment. Several days before trial, however, the state did orally move to introduce the convictions. Garcia objected that such a motion was untimely, but the trial court held that "Garcia must [have] be[en] aware of the prior felony offenses" and therefore concluded that the state was permitted to introduce them for impeachment purposes.

¶14 The purpose of Rule 16.1's requirement that all motions be filed at least twenty days prior to trial is to ensure that each party is provided with adequate notice. *Cf. State v. Davis*, 137 Ariz. 551, 561-62, 672 P.2d 480, 490-91 (App. 1983) (implying Rule 16.1 ensures defendant has notice of state's intent to use prior convictions during sentencing). Garcia does not argue that the state's oral motion was insufficient to give him notice of the state's intent to present his prior convictions should he choose to testify. Rather, Garcia simply asserts the notice was untimely. He has therefore failed to demonstrate he was denied adequate notice or prejudiced in any way. The trial court did

not abuse its discretion in permitting the state to orally move to introduce Garcia's prior convictions for impeachment purposes less than twenty days prior to trial. *See Zimmerman*, 166 Ariz. at 328, 802 P.2d at 1027 (trial court may extend deadline to file pre-trial motion and may also, in its discretion, hear late motions).

Insufficiency of the Evidence

¶15 Garcia also asserts the state presented insufficient evidence to prove he was guilty of theft of a winch valued at $1,000 or more because the state failed to introduce evidence of the winch's fair market value at the time of the theft and instead only presented evidence about the winch's value "at some indeterminable time in the past." The state, on the other hand, argues Garcia's theft conviction should be affirmed because the owner's testimony as to the value of the winch constituted competent evidence of its value.

¶16 "With respect to a theft conviction, if the record does not contain substantial evidence to show the fair market value of the property stolen, there is insufficient evidence to support the theft classification, and fundamental error results." *State v. Fimbres*, 222 Ariz. 293, ¶ 23, 213 P.3d 1020, 1027 (App. 2009). Pursuant to A.R.S. § 13-1801(A)(15), "value" is defined as the fair market value of the property at the time the theft occurred. And a property owner is qualified to testify to the fair market value of his property at the time it was taken. *State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988).

¶17 Here, S.H. testified that the value he placed on the winch and platform assembly was at least $1,000. Although he arrived at that figure by including the

purchase price and customization, there is no indication from S.H.'s testimony that his estimate was not an accurate determination of the winch's value at the time it was stolen. In fact, defense counsel asked S.H. whether the winch's fair market value would have declined because it was used, *see State v. Wolter*, 197 Ariz. 190, ¶ 1, 3 P.3d 1110, 1111 (App. 2000), and S.H. responded that he had only used the winch six times—an answer implying the winch was worth the same amount at the time of the theft as when it was initially customized.

¶18 Citing *State v. Blankenship*, 127 Ariz. 507, 511-12, 622 P.2d 66, 70-71 (App. 1980), however, Garcia contends that S.H.'s testimony was insufficient to establish the winch's fair market value because "[w]here . . . the item is unique, expert testimony is required to establish its value." *Blankenship* involved whether specific testimony was required to establish the value of stolen property or whether the property's value could instead be inferred from other evidence presented. *Id.* The court stated that specific testimony was not required unless the property was so unique as to require expert testimony as to its value. *Id.* Garcia has not demonstrated, nor is there anything in the record to establish, that the winch was so unique that expert testimony was required to establish its value. *Blankenship* is therefore inapplicable, and sufficient evidence was presented to demonstrate the winch's fair market value at the time it was stolen.

Consecutive Sentences

¶19 Garcia finally argues that, under the test set forth in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), the trial court erred in running his sentence for third-degree burglary consecutive to his sentence for theft. Garcia did not object to the

consecutive sentences below. We therefore review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). However, the "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶20 As provided in A.R.S. § 13-116, "A[] [single] act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." To determine whether a defendant's conduct constituted a single act, we apply the three-part analysis provided in *Gordon*. 161 Ariz. at 315, 778 P.2d at 1211.

> [We] consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

¶21 In applying the *Gordon* test to this case, we begin by determining whether burglary or theft was the ultimate crime. *See id.* Both Garcia and the state agree that third-degree burglary was the ultimate crime under the facts of this case. As the court

stated in *Gordon*, the ultimate crime is often the crime that is the most serious of the defendant's charges. *Id.* Garcia received a presumptive two-and-a-half-year sentence for his burglary conviction but only a one-year sentence for the theft. We therefore begin our *Gordon* analysis by subtracting the facts necessary to convict Garcia of the ultimate charge of third-degree burglary from the remaining evidence.

¶22 A person commits third-degree burglary by entering or remaining "unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or felony therein." A.R.S. § 13-1506(A)(1). Subtracting these facts from the evidence, we are left with the fact that Garcia controlled S.H.'s property with the intent to deprive S.H. of it—sufficient evidence to support his conviction for theft. *See* A.R.S. § 13-1802. In Garcia's analysis of the first prong of the *Gordon* test, however, he misconstrues the requirements of the statutes, equating the intent required to commit burglary with the intent required for theft. But the intent required for burglary—the intent to commit a theft or a felony therein—is different from the intent to commit a theft—the intent to deprive a property owner of his property or controlling the property of another knowing it is stolen. *See* §§ 13-1802(1), (5), 13-1506. Therefore, application of the first *Gordon* factor suggests consecutive sentences were permissible in this case. *Cf. State v. Arnold*, 115 Ariz. 421, 423, 565 P.2d 1282, 1284 (1977) (defendant can be convicted and sentenced for both theft and burglary); *Vaughn v. State*, 13 Ariz. App. 15, 473 P.2d 817 (1970) (same).

¶23 Proceeding to the next part of the *Gordon* test, we consider whether, in the context of the entire transaction, "it was factually impossible to commit the ultimate

crime without also committing the secondary crime." 161 Ariz. at 315, 778 P.2d at 1211. Garcia attempts to switch the crimes that he considers the ultimate crime in this portion of the analysis, stating that it was "factually impossible to commit the theft without committing the burglary." But the ultimate crime remains the same throughout the *Gordon* analysis. Accordingly, because Garcia originally asserted that burglary was the ultimate crime, we continue to conduct the *Gordon* analysis with burglary as the ultimate crime and theft as the secondary crime.

¶24 Considering the factual episode as a whole, the evidence established that Garcia entered S.H.'s locked storage shed with the intent to commit a felony therein *before* taking the winch from the shed and before controlling it at a later point in time. It was therefore factually possible, under the circumstances of this case, for Garcia to have committed the burglary of the shed without committing the theft of the winch, increasing the likelihood that Garcia committed separate acts.

¶25 Because our analysis of *Gordon*'s first two factors indicates that Garcia committed separate acts, we need not consider the third *Gordon* factor. *See State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993). We conclude Garcia's conduct did not constitute a single act and that his consecutive sentences did not violate § 13-116. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

Conclusion

¶26 We affirm Garcia's convictions and sentences, subject to the trial court's entry of findings on the mistrial issue. Accordingly, we remand this matter to the trial court so that it may enter additional findings as to whether a mistrial would have been

appropriate under the circumstances of the case. If the court finds it should have declared a mistrial, it must vacate Garcia's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge